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L.C., I.H., A.L., and Antonia Salas Ubaldo

**UNITED STATES DISTRICT COURT FOR THE
CENTRAL DISTRICT OF CALIFORNIA**

L.C., a minor by and through her guardian *ad litem* Maria Cadena, individually and as successor-in-interest to Hector Puga; I.H., a minor by and through his guardian *ad litem* Jasmine Hernandez, individually and as successor-in-interest to Hector Puga; A.L., a minor by and through her guardian *ad litem* Lydia Lopez, individually and as successor-in-interest to Hector Puga; and ANTONIA SALAS UBALDO, individually;

Plaintiffs,

vs.

STATE OF CALIFORNIA; COUNTY OF SAN BERNARDINO; S.S.C., a nominal defendant; ISAIAH KEE; MICHAEL BLACKWOOD; BERNARDO RUBALCAVA; ROBERT VACCARI; JAKE ADAMS; and DOES 6-10, inclusive,

Defendants.

Case No. 5:22-cv-00949-KK-SHK

Honorable Kenly Kiya Kato

**PLAINTIFFS' OPPOSITION TO
COUNTY DEFENDANTS' MOTION
IN LIMINE NO. 2 TO EXCLUDE
TESTIMONY, EVIDENCE
ARGUMENT REGARDING
PORTIONS OF ROGER CLARK'S
OPINIONS**

1 **I. INTRODUCTION**

2 Plaintiffs’ retained police practices expert, Roger Clark, is a twenty-seven-year
3 veteran of the Los Angeles County Sheriff’s Department, who has served as a police
4 practices expert on thousands of cases since his retirement from the force. Indeed, the
5 Ninth Circuit as well as district courts within the Ninth Circuit, have generally
6 accepted Mr. Clark’s qualifications to opine on police officer standard practices and
7 training. *See, e.g., Tabares v. City of Huntington Beach*, 988 F.3d 1119, 1127 (9th
8 Cir. 2021) (crediting Mr. Clark’s opinions regarding whether a reasonable officer in
9 the defendant officer’s position, acting with consistent standard police practices and
10 training, would have or should have known the decedent was mentally ill); *Valtierra*
11 *v. City of Los Angeles*, 99 F. Supp. 3d 1190, 1199 (C.D. Cal. 2015) (finding Mr.
12 Clark to be a qualified expert on police training and procedures); *Godinez v. Huerta*,
13 No. 16-CV-0236-BAS-NLS, 2018 WL 2018048, at *3 (S.D. Cal. May 1, 2018)
14 (recognizing that courts have found Mr. Clark to be qualified as an expert in police
15 training, standards, and policies); *Vaughn v. City of Los Angeles*, No.
16 CV1603086ABAJWX, 2017 WL 8786868, at *4 (C.D. Cal. Oct. 30, 2017) (after
17 reviewing Mr. Clark’s qualifications, finding that Mr. Clark is qualified to offer
18 expert testimony regarding policies and procedures regarding law enforcement use of
19 the taser and hobble restraint and bullet trajectories). Mr. Clark was retained in this
20 case to offer opinions regarding the involved-officers’ conduct, tactics, and use of
21 force as it relates to standard officer practices and training.

22 Defendants now move *in limine* to exclude certain testimony from Mr. Clark,
23 contending that they are inadmissible pursuant to *Daubert*. For the reasons discussed
24 below, Plaintiffs oppose Defendants’ Motion in its entirety.

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II. MR. CLARK’S OPINIONS REGARD REGARDING SERGEANT VACCARI’S DEPLOYMENT OF THE PEPPERBALL LAUNCHER ARE ADMISSIBLE

Defendants mischaracterize Mr. Clark’s opinions relating to the deployment of the pepper ball launcher in arguing that these opinions should be excluded because Mr. Clark has no specialized training in the pepper ball launcher. Mr. Clark’s opinions regarding Sergeant Vaccari’s *intentional* deployment of pepper balls to *strike* Mr. Puga as an impact weapon and subsequent striking of Mr. Puga in the head/face with pepper balls *does not* require specialized knowledge regarding pepper ball launchers. Mr. Clark does not attempt to offer opinions based on how the pepper ball launcher works. Rather, he offers admissible general police practices and training opinions regarding officer situational awareness, the deployment of pepper balls as an impact weapon to a suspect’s head/face, and under what context impacts or strikes/blows to the head/face are appropriate based on his expertise in POST and law enforcement standards, as well as his review of specific County of San Bernardino training and guidance regarding the deployment of the pepper ball launcher as an impact weapon. *See Valtierra v. City of Los Angeles*, 99 F. Supp. 3d 1190, 1197 (C.D. Cal. 2015) (finding that although Mr. Clark is not an expert in the features and use of the taser and thus is not qualified to opine on the effects of the taser, he is qualified to opine on “whether tasers may cause bodily injury and when taser deployment is an appropriate use of force...to the extent that such testimony is based on Clark’s expertise in POST and other law enforcement standards).

Additionally, while Plaintiffs contend that Mr. Clark does not need specialized expertise regarding the pepper ball launcher to offer his opinions regarding whether the deployment of the pepper ball launcher to intentionally strike a suspect, especially in the head/face, is appropriate under the circumstances pursuant to standard police practices and training, Mr. Clark has been accepted as a qualified expert regarding specific use and training of the pepper ball launcher in *Nelson v. City of Davis*, 709 F.

1 Supp. 2d 978, 982 n.2 (E.D. Cal. 2010), aff'd, 685 F.3d 867 (9th Cir. 2012). In
2 *Nelson*, the district court overruled defendants' objections regarding Mr. Clark's
3 opinions with respect to the accurate range of pepper ball launchers and risks
4 surrounding the deployment of such weapon in striking unintended targets and
5 vulnerable body areas, finding that his opinions are consistent with the training. *Id.*
6 As Mr. Clark has acquired specialized knowledge regarding the pepper ball launcher
7 through his work as a police practices expert, including his work in the *Nelson* case
8 and his review of County of San Bernardino's training and guidance on the use of the
9 pepper ball launcher, Mr. Clark is qualified to offer opinions regarding the use of the
10 pepper ball launcher. *See A.B. v. Cnty. of San Diego*, No. 18CV1541-MMA-LL, 2020
11 WL 4430971, at *3–4 (S.D. Cal. July 31, 2020) (finding Clark to be qualified to offer
12 opinions regarding the taser despite his limited experience with the taser because his
13 opinions were based on specialized knowledge that he acquired through promulgated
14 taser standards and training, including the defendant county's own training).

15 Lastly, Mr. Clark does not *speculate* as to whether Mr. Puga was shot in the
16 eye. He simply offers an opinion that deployment of the pepper ball launcher to strike
17 Mr. Puga in the head/face is inappropriate under police practices and training, and
18 there is evidence in the record—through numerous witness testimony regarding Mr.
19 Puga's statements of being hit in the eye during a pepper ball deployment and
20 observations of Mr. Puga bleeding from around the eye area when he exited the
21 vehicle—that Sergeant Vaccari's deployment of the pepper ball launcher under
22 assumed facts was inappropriate and violated standard police practices and training.
23 *See Hyeer v. City & Cnty of Honolulu*, 118 F.4th 1044, 1056–58 (9th Cir. 2024)
24 (holding the district court abused its discretion in excluding expert reports for lacking
25 sufficient facts or data because the opinions contained in those reports were based on
26 assumption of facts supported by evidence found in the record, despite those facts
27 being in disputed).

1 **III. MR. CLARK’S IDENTIFIED OPINIONS ARE NOT LEGAL**
2 **CONCLUSIONS**

3 Defendants also seek to exclude certain opinions from Mr. Clark as improper
4 legal conclusions, but the opinions identified by Defendants in their argument are *not*
5 *legal conclusions*. An expert’s “opinion is not objectionable just because it embraces
6 an ultimate issue.” Fed. R. Evid. 704(a). However, Courts have found police practices
7 opinions on the threat posed by a suspect to be admissible, and not a legal conclusion.
8 *See Willis v. City of Fresno*, 680 F. App’x 589, 591 (9th Cir. 2017) (finding that the
9 court did not abuse its discretion in admitting plaintiffs’ police practices expert’s
10 testimony that the suspect no longer pose a threat when the officer fired the final
11 shots); *Est. of Elkins v. Pelayo*, No. 1:13-CV-1483 AWI SAB, 2022 WL 1123117, at
12 *3 (E.D. Cal. Apr. 14, 2022) (finding that Clark was opined on the threat posed by
13 decedent so long as Clark had a basis in fact and law enforcement understanding,
14 practices, and standards to give any opinion regarding the threat, or lack thereof,
15 posed by the decedent); *Castro v. Cnty. of Los Angeles*, No. 2:13–CV–06631–
16 CAS(SSX), 2015 WL 4694070, at *14 (C.D. Cal. Aug. 3, 2015) (finding plaintiff’s
17 police practices expert’s opinion, that a similarly trained officer would not have
18 considered the decedent to be a lethal threat, was not an impermissible legal
19 conclusion).

20 Similarly, Defendants’ identified opinions regarding “excessive force” and
21 “unnecessary force” are not legal opinions. At no point does Mr. Clark ever opine
22 that any use of force was “excessive force.” Rather, he states that officers are *trained*
23 that an overreaction is excessive force and thus, an officer’s overreaction in using
24 deadly force is also excessive force. (Clark Report, Opinions 2, 3). Lastly, Mr.
25 Clark’s statement regarding the officers’ use of unnecessary lethal force is offered in
26 the context of their negligent tactics and conduct leading up to the use of force,
27 limiting their tactical options, and their failure to utilize other reasonable, available
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1 means. Essentially, the officers would not have been in a position to use lethal force
2 had they utilized proper police tactics and training.

3 Accordingly, Mr. Clark's opinions and statements identified by Defendants are
4 not impermissible legal conclusions and therefore, admissible at trial.

5 **IV. MR. CLARK'S STATEMENTS REGARDING THE VIDEO EVIDENCE**
6 **ARE NOT OPINIONS AND ARE ADMISSIBLE**

7 Contrary to Defendants' representations, Mr. Clark does not attempt to offer
8 opinions regarding what the video evidence shows. Instead, the statements Mr. Clark
9 makes regarding the video evidence are in the context of what he reviewed and relied
10 upon in forming his opinions. For example, Mr. Clark does not attempt to definitively
11 opine what can be seen in the video while Mr. Puga is running, rather, he states Mr.
12 Puga's running actions and lack of turning motion *as a basis* for his opinion
13 regarding the officers' use of lethal force while Mr. Puga was running away. *See A.B.*
14 *v. Cnty. of San Diego*, No. 18CV1541-MMA-LL, 2020 WL 4431982, at *2 (S.D. Cal.
15 July 31, 2020) ("A.B. II") (allowing defendants' police practices expert to testify to
16 what he observed in the videos because those formed the basis for his opinions as to
17 whether the officers acted appropriately). Similarly, Mr. Clark's testimony regarding
18 whether he can see a gun in any of the videos is *not* an opinion, rather, it was merely
19 an observation he gave in response to specific deposition questions posed to him
20 regarding whether a gun can be seen in any of the videos, *see A.B.*, 2020 WL
21 4430971, at *4 (finding Clark's statement regarding the amount of time the taser
22 made contact with the decedent was not an opinion but "merely an observation he
23 gave in response to a deposition question"), and his assumption that Mr. Puga was
24 not holding a gun based on his viewing of the videos forms the basis for some of his
25 opinions, *cf. Lam v. City of San Jose*, No. 14-CV-00877-PSG, 2015 WL 6954967, at
26 *2 (N.D. Cal. Nov. 10, 2015) (allowing an expert to provide opinions based on a
27 party's version of the facts because Rule 704 encourages expert opinions on ultimate
28 issues and an expert cannot opine on an ultimate issue without relying on a particular

1 version of the facts). Lastly, Mr. Clark's observation of whether Deputy Adams was
2 positioned at the time the shots started is *not* a proffered opinion; such statement was
3 simply included in his "Brief Overview of Events," which contained evidence he
4 reviewed and observed in forming his opinions. Accordingly, Mr. Clark's
5 observations regarding the video evidence are admissible as they are assumptions of
6 facts, supported by the evidence, which help form the basis of his opinions.

7 **V. MR. CLARK'S OPINION 4 IS NOT SPECULATIVE**

8 Mr. Clark's fourth opinion *does not* imply that all four officers shot while Mr.
9 Puga was on the ground. He does not attempt to resolve this fact. Instead, his opinion
10 is based on the officers' testimony that they discharged their weapons at Mr. Puga
11 and that it was undisputed that shots were fired at Mr. Puga after he had gone to the
12 ground. Mr. Clark concedes that "no officer admitted to firing at Mr. Puga after he
13 had gone to the ground," but because all four officers did admit to shooting at Mr.
14 Puga and it is undisputed that shots were fired at Mr. Puga while he was on the
15 ground, Mr. Clark *assumes* that at least one, if not all four officers, shot while Mr.
16 Puga was on the ground for the purposes of his opinion regarding whether those shots
17 were appropriate pursuant to standard police practice and training.

18 **VI. MR. CLARK'S OPINIONS 8, 9, AND 10 ARE RELEVANT**

19 Mr. Clark's opinions regarding the officers' conduct and tactics as it relates to
20 the subsequent injuries sustained by the Bottens are "highly relevant" to the excessive
21 force inquiry. *See Ymelda Elena, et al. v. City of Los Angeles, et al*, No. CV 22-7651-
22 KK-KSX, 2025 WL 1144824, at *2 (C.D. Cal. Mar. 19, 2025) (denying motion in
23 limine to exclude evidence relating to the death of an innocent bystander as a result
24 of the officers' use of lethal force against the decedent because such evidence was
25 "highly relevant to the objective reasonableness standard, including whether
26 defendant [officer's] actions were reasonable"). In *Boyd v. Benton County*, 374 F.3d
27 773 (9th Cir. 2004), the Ninth Circuit explained that the presence of innocent
28 bystanders and the risk of harm to those bystanders by the officers' use of force may

1 be relevant to the totality of the circumstances under the excessive force inquiry. 374
2 F.3d at 779. Relying on *Boyd*, several courts have considered “whether innocent
3 bystanders may be injured in addition to the targets of force” in the excessive force
4 analysis. *Xiong v. Chavez*, No. 1:13-CV-00083-SKO, 2016 WL 345609, at *5 (E.D.
5 Cal. Jan. 28, 2016); *see also Bailey v. County of San Joaquin*, 671 F.Supp.2d 1167,
6 1173 (E.D. Cal. 2009) (a reasonable jury could find the officer’s use of deadly force
7 to be unreasonable where there was evidence that he was aware there were innocent
8 bystanders nearby and nonetheless “fired his gun under circumstances in which he
9 could not predict where the bullet would likely travel or if fragmented, who might be
10 injured,” injuring said bystanders); *Hulstedt v. City of Scottsdale*, 884 F. Supp. 2d
11 972, 990 (D. Ariz. 2012); *Tuggle v. City of Tulare*, No. 1:19-CV-01525-JLT-SAB,
12 2023 WL 4273900, at *18 (E.D. Cal. June 29, 2023). Moreover, under Plaintiffs’
13 negligence claim, police officers “have a duty to act reasonably when using deadly
14 force, a duty that extends to the totality of the circumstances surrounding the
15 shooting, including the officers’ preshooting conduct.” *Hayes v. Cnty. of San Diego*,
16 57 Cal. 4th 622, 638 (2013). Thus, Mr. Clark’s opinions regarding whether the
17 officers knew or should have known that there were innocent bystanders in the
18 residential homes surrounding the incident location in the middle of the night and the
19 officers’ failure to follow standard police practices and training to ensure the safety
20 of those individuals, resulting in serious injuries to the Bottens, is relevant to the
21 evaluation of the reasonableness of the officers’ conduct leading up to their use of
22 deadly force as well as their use of deadly force.

23 **VII. CONCLUSION**

24 For the foregoing reasons, Plaintiffs respectfully request the Court deny
25 County Defendants’ Motion in Limine No. 2 to Exclude Testimony, Evidence,
26 Argument Regarding Portions of Roger Clark’s Opinions in its entirety.

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1 Respectfully Submitted,

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3 Dated: April 24, 2025

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5 By: /s/ Hang D. Le

6 Dale K. Galipo

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9 *Antonia Salas Ubaldo*
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Certificate of Compliance

The undersigned, counsel of record for Plaintiffs L.C., I.H., A.L., and Antonia Salas Ubaldo, certifies that this brief contains **2,387** words, which complies with the 7,000 word limit of L.R. 11-6.1.

Dated: April 24, 2025

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